

LIAN MONG YEE

a

v.

ABDUL RASHID MAIDIN & ORS

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

MOKHTAR SIDIN JCA

MOHD SAARI YUSSOF JCA

[CIVIL APPEAL NO: B-02-247-1998]

18 JUNE 2001

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CIVIL PROCEDURE: *Consent order - Jurisdiction to set aside - Whether judge has discretion*

CONTRACT: *Illegality - Public policy - Payment of money in consideration of withdrawing police report - Whether void as being contrary to public policy - Contracts Act 1950, ss. 24, 25*

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The appellant and the respondents were parties to a prior litigation. During the course of that litigation, the appellant lodged a report against the first respondent. It alleged that the first respondent had cheated the appellant over a power-plant project abroad. The parties entered into a consent order which required the respondents to pay the appellant in full and final settlement of the latter's claim. In consideration of this payment, the appellant was to withdraw all complaints and reports against the respondents.

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A further consideration in the consent order was that the injunction that the respondents had earlier obtained against the appellant would be dissolved. The appellant then took steps to enforce the consent order. He instituted winding-up proceedings against the respondents. The respondents wanted to truncate the enforcement proceedings and return to *status quo*. They took out a summons claiming that: (i) the consent order be set aside; (ii) the execution and enforcement proceedings based on the consent order including the winding-up petitions be set aside or struck off; and (iii) the sum of RM5.1m paid pursuant to the consent order be forthwith deposited by the appellant with this court in an interest bearing account.

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The issue for consideration was whether the consent order was void for illegality. The preliminary issue however was whether it was within the jurisdiction of the High Court to grant a declaration that the consent order was void and unenforceable by reason of illegality.

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a Held:
Per Gopal Sri Ram JCA

b [1] The jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to the discretionary bars that operate upon the conscience of the particular litigant. Therefore if the respondents were right in their argument, and the consent order was void for illegality, the judge had the jurisdiction to make the order that he make.

c [2] The appellant in consideration of a certain sum of money agreed not to go forward with the charge of cheating he had alleged in his police report against the respondents. The agreement to retract the police report that alleged such an offence was against public policy and was void. The consent order therefore was void and the learned judge was right in setting aside the order.

d [3] Section 73 of the Contracts Act 1950 states that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. The respondents admitted that they asked for the term in the consent order. The respondents therefore had not pleaded coercion within s. 73 of the Contracts Act 1950 and in fact they were in *pari delicto*. Taking into account these facts, the judge's order that required the appellant to pay the sum of RM5.1m must be set aside.

e [Order accordingly.]

f [*Bahasa Malaysia Translation Of Headnotes*]

g Perayu dan responden-responen merupakan pihak-pihak kepada litigasi yang dahulu. Ketika perjalanan litigasi itu, perayu telah membuat laporan terhadap responden pertama. Ianya mendakwa bahawa responden pertama telah menipu perayu atas projek loji kuasa di luar negara. Pihak-pihak tersebut telah memasuki perintah persetujuan yang menghendaki responden-responen membayar perayu sepenuhnya untuk penyelesaian muktamad. Sebagai balasan bagi pembayaran ini, perayu haruslah menarik-balik kesemua aduan dan laporan terhadap responden-responen.

h Perayu kemudiannya mengambil langkah-langkah untuk menguatkuasakan perintah persetujuan tersebut. Beliau telah memulakan prosiding penggulangan terhadap responden-responen. Responden hendak mematahkan prosiding penguatkuasaan ini dan mahu kembali kepada *status quo*. Mereka telah mengeluarkan saman yang menuntut bahawa: (i) perintah persetujuan tersebut

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hendaklah diketepikan; (ii) prosiding pelaksanaan dan penguatkuasaan berdasarkan perintah persetujuan tersebut termasuk petisyen penggulangan hendaklah diketepikan atau dibatalkan; dan (iii) jumlah sebanyak RM5.1 juta yang dibayar selaras dengan perintah persetujuan hendaklah segera didepositkan oleh defendant dengan mahkamah ini dalam akaun berfaedah.

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Isu untuk pertimbangan adalah samada perintah persetujuan tersebut batal kerana kepenyalahan undang-undang. Isu awal adalah samada ianya di dalam lingkungan bidangkuasa Mahkamah Tinggi untuk memberikan pengisytiharan bahawa perintah persetujuan tersebut adalah batal dan tidak boleh dikuatkuasakan disebabkan oleh kepenyalahan undang-undangnya.

*b**c***Diputuskan:****Oleh Gopal Sri Ram HMR**

[1] Bidangkuasa untuk mengenepikan sesuatu kontrak adalah universal dan merangkumi semua jenis kontrak-kontrak batal. Ianya menunjukkan sifat fleksibel ekuiti dalam bidang remedi-remedi dan keupayaannya untuk melakukan keadilan dalam kes-kes di mana tiadanya common law. Seperti sebarang bidangkuasa ekuiti yang lain, ianya adalah tertakluk kepada rintangan-rintangan budibicara. Oleh itu jikalau responden-responden adalah betul dalam hujahan mereka, dan perintah persetujuan tersebut batal kerana kepenyalahan undang-undang, hakim mempunyai bidang kuasa yang secukupnya untuk membuat perintah yang telah beliau buat.

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[2] Sebagai balasan bagi satu jumlah wang yang tertentu perayu telah bersetuju untuk tidak meneruskan pertidihan menipu yang telah beliau dakwa di dalam laporan polis terhadap responden-responden. Persetujuan untuk menarik-balik laporan polis yang mendakwa kesalahan yang sedemikian adalah bertentangan dengan dasar awam dan tak sah. Perintah persetujuan tersebut dengan itu adalah batal dan hakim yang bijaksana betul dalam mengenepikan perintah tersebut.

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[3] Seksyen 73 Akta Kontrak 1950 menyatakan bahawa seseorang kepada siapa wang telah dibayar atau apa-apa pun yang telah dihantar secara salah atau di bawah paksaan mestilah membayar balik atau memulangkannya. Responden-responden mengakui bahawa mereka meminta terma tersebut di dalam perintah persetujuan. Responden-responden dengan itu telah tidak memplid paksaan di dalam lingkungan s. 73 Akta Kontrak 1950 dan pada hakikatnya mereka berada dalam *pari delicto*. Mengambil kira fakta-fakta ini, perintah hakim yang menghendaki supaya perayu membayar jumlah sebanyak RM5.1 juta mestilah diketepikan.

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[Perintah sekadarnya.]

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a Case(s) referred to:

Bhowanipur Banking Corporation Ltd v. Durgesh Nandini AIR [1941] PC 95 (refd)
Charles Ooi Kiah Inn v. Kukuh Maju Industries Sdn Bhd [1993] 2 MLJ 224 (foll)
Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo & Ors [1988] 1 CLJ 319;
[1988] 1 CLJ (Rep) 457 (refd)

b Cooper v. Phibbs [1867] LR 2 HL 149 (refd)

Jagdish v. Kaussilla Devi AIR [1947] All 317 (refd)
Kanhaya Lal v. National Bank of India Ltd [1913] ILR 40 (refd)
Magee v. Pennine Insurance Co Ltd [1969] 2 QB 507 (refd)
Shripad v. Sanikatta Co-operative Salt Sale Society AIR [1945] Bom 82 (refd)
Smith v. Cuff [1817] 105 ER 1203 (dist)

c Legislation referred to:

Contracts Act 1950, ss. 15, 24, 25, 73

Contract Act 1872 [India], ss. 23, 24

For the appellant - K Anantham (CL Wong); M/s Skrine & Co

d For the respondents - KS Narayanan (Saranjit Singh); M/s KS Narayanan Assoc

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-24-786-97]

Reported by Mariette Peters-Goh

JUDGMENT**e****Gopal Sri Ram JCA:**

This appeal raises two short issues. Both have been visited by our courts on previous occasions. It has to do with the lawfulness of the consideration provided for an agreement and the right of a party to recover monies paid under such a contract. The facts of this case are not in dispute.

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The appellant and respondents are parties to a prior litigation. During the course of that litigation, the appellant lodged a report against, *inter alia*, the first respondent, *vide*, Tun H.S. Lee report number 1524/96. It alleged that the first respondent had cheated the appellant over a power plant project abroad. This is a non-compoundable offence.

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On 15 October 1996, the parties to the earlier litigation entered into a consent order. In essence, that consent order required the instant respondents to pay the appellant RM32,100,000 in full and final settlement of the latter's claim. An integral part of the consideration for this payment appears in a later paragraph of the consent order. It provides that the appellant will apply to the relevant authorities to withdraw all complaints and reports against the respondents. A further consideration for the agreement housed in the consent

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order was that the injunction that the respondents had earlier obtained against the appellant would be dissolved. Later, the appellant took steps to enforce the consent order. He instituted winding-up proceedings against the corporate respondents and bankruptcy proceedings against the natural respondents. A majority of these proceedings were commenced in the Shah Alam High Court. The respondents wanted to truncate these enforcement proceedings. They wanted to return to the *status quo ante*, immediately prior to the consent order. For this purpose they took out an originating summons in the Shah Alam High Court. They claimed the following relief in their summons:

- 1) For an Order that the Consent Order dated 15 October 1996 recorded in Kuala Lumpur High Court Civil Suit No. D1-22-16-96 be set aside.
- 2) That upon and in the event this Honourable Court grants prayer (1) above the following consequential orders be granted:
 - (a) that the Kuala Lumpur High Court Civil Suit No. D1-22-16-96 be transferred to the High Court in Shah Alam and the said action be set down for trial.
 - (b) that all execution and enforcement proceedings based on the said Consent order including the Winding Up Petitions namely Kuala Lumpur High Court Companies Winding Up No. D2-28-305-97 and Shah Alam High Court Companies Winding Up No. 28-69-97 and Bankruptcy Proceedings namely Shah Alam High Court Bankruptcy No. 29-65-97 and Bankruptcy No. 29-61-97 instituted pursuant to the Consent Order are improper and ought to be set aside/struck off.
 - (c) that the sum of RM5.1 million paid pursuant to the Consent Order to the defendant together with interest thereon from 20 October 1996 to date be forthwith deposited by the defendant with this Honourable Court in an interest bearing account pending the hearing and disposal of Civil Suit No. D1-22-16-96 referred to in (a) above.
- 3) Costs and;
- 4) Such further and other relief as this Honourable Court may deem fit and proper.

The judge who heard the summons granted the relief sought. The appellant appealed to this court. We heard arguments of counsel on 30 August 2000 and dismissed the appeal. We now give our reasons for upholding the learned judge's order.

- a* There is a preliminary issue that I would like to deal with before embarking upon the questions that lie at the heart of this appeal. It has to do with the correctness of the learned judge's order in setting aside the consent order. No challenge to his jurisdiction to do so has been raised by counsel for the appellant. This is not surprising. Ordinarily, the respondents would have been
- b* entitled to move the High Court for a declaration that the consent order was void and unenforceable by reason of its illegality. It is well within the jurisdiction of the High Court to grant such a declaration. But equity in order to give complete justice has always asserted jurisdiction to grant consequential relief by setting aside void transactions either on terms or *sans* any terms.
- c* Thus, in *Cooper v. Phibbs* [1867] LR 2 HL 149, the lease of a fishery was held to be void on the ground of mistake. The lessee was already the owner of the fishery in question. It was a case of *res sua*. The House of Lords having found the agreement void, went on to set it aside on terms that the lessor should have a lieu on the fishery for such money he had expended on its
- d* improvement. In *Magee v. Pennine Insurance Co. Ltd* [1969] 2 QB 507 a majority of the English Court of Appeal set aside a contract for mistake without imposing any terms.

e In my judgment, the jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to discretionary bars that operate upon the conscience of the particular litigant. So, laches, unclean hands, want of mutuality and so forth are grounds upon which equitable relief may be denied.

f In the present instance, if the respondents are right in their argument, the consent order is void for illegality. It may therefore be set aside like any other agreement. The learned judge accordingly had ample jurisdiction to make the order that he did.

g That brings me to the critical question. Was the consent order void for illegality? That is the first central issue.

Mr. Ananthan of counsel for the appellant argued that the interpretation placed on the consent order by the respondents is wrong. He says that his client

h merely agreed to ask for permission to withdraw the report and that there was part performance of the order in that the injunction obtained by the respondents had been discharged to the respondents' benefit. In support of this argument, counsel cited *Shripad v. Sanikatta Co-operative Salt Sale Society* AIR [1945] Bom. 82. That case is authority for the proposition that there is a distinction

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when the latter is illegal that an agreement based upon such a consideration is void. The case also decides that an agreement not to object to the withdrawal of a complaint in respect of a non-compoundable offence is against public policy since it is the duty of the complainant to wholeheartedly proceed with the prosecution in the interests of justice.

In responding to these arguments, Mr. Narayanan of counsel relied on two authorities which he said adequately covered the factual matrix of the present appeal. The first of these is the leading case of *Bhowanipur Banking Corporation Ltd. v. Durgesh Nandini* AIR [1941] PC 95. Lord Atkin who delivered the advice of the Board set out the applicable principles governing the parallel provision in the Indian Contract Act 1872. He said (at p. 96):

In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

The provisions of our Contracts Act 1950 that are relevant to this part of the case are ss. 24 and 25. They read as follows:

24. The consideration or object of an agreement is lawful, unless –

- (a) it is forbidden by a law;
- (b) it is of such a nature that, if permitted, it would defeat any law;
- (c) it is fraudulent;
- (d) it involves or implies injury to the person or property of another; or
- (e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

- a* The identical provisions in the Indian statute are ss. 23 and 24.
- The second authority is *Charles Ooi Kiah Inn v. Kukuh Maju Industries Sdn. Bhd.* [1993] 2 MLJ 224. In that case, the defendants entered into an agreement with the plaintiff under the terms of which two civil suits were compromised. The defendants also executed a guarantee. The plaintiff had, while the disputes were afoot, lodged a report alleging that he had been cheated. As part of the compromise the plaintiff agreed to withdraw the charges set out in the police report. Subsequently, the plaintiff sued on the guarantee for the balance remaining unpaid under the principal agreement. The trial judge gave judgment for the plaintiff. The defendants appealed. The Supreme Court allowed the appeal. That much is clear from the text of the judgment although the report of the case, both in the headnote and its conclusion erroneously states that the appeal was dismissed. The court held that the agreement in question was one that stifled a prosecution and was accordingly void.
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- c*
- d* Here too, the appellant had agreed not to go forward on the charge of cheating he had alleged in his police report against the first respondent. As observed by the Supreme Court in *Charles Ooi's* case, cheating being a non-compoundable offence, an agreement to retract a police report that alleged such an offence is against public policy and void.
- e* Having considered this part of the case most carefully, I came to the conclusion that there was no distinction of any significant materiality between the present case and *Charles Ooi's* case. In particular, I consider *Charles Ooi's* case and the cases therein cited – and these include two Privy Council decisions – to bind us as a matter of precedent. They are certainly of much greater weight than the observations of Verma J, in *Jagdish v. Kaussilla Devi* AIR [1947] All 317 cited by Mr. Anantham. The passage read to us appears at p. 325 of the report. This is what it says:
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- Considering the matter in all its aspects I am of opinion that each case must be decided upon its merits and that the Courts should look to the substance of the agreement between the parties. If there is any suspicion of blackmail or extortion or if the contract was based upon a promise really to hamper the administration of law so as to prevent investigation into a criminal charge which was of interest not only to the persons concerned but to the public at large, then I have no doubt the contract should not be enforced. If, however, there is it *bona fide* civil dispute which the parties have decided to settle and there happen to be subsidiary proceedings in a criminal Court it seems to me that would be contrary to public policy and to justice and equity to allow any person to escape his proper legal liabilities on the mere technical ground that there was some understanding that those criminal proceedings would not be pressed to a conclusion.
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That, with respect, is not an accurate statement of the law. I must therefore reject counsel's stand taken in reliance of that passage.

For the reasons given, I was of the view that the judge in the present case had judicially appreciated the facts and had properly directed himself on the applicable law. It was therefore my view that the consent order was utterly void. Following the equity jurisprudence that governs remedies in this area of the law, it was my view that the learned judge was right in setting aside the consent order.

Next I turn to the consequential orders made by the judge. Here, Mr. Anantham's submission was that the parties were in *pari delicto* and the judge ought not to have permitted recovery. Mr. Narayanan relies on s. 73 of the Contracts Act to support the judge's decision on this part of the case. That section (inclusive of its illustrations) reads:

73. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

- (a) A and B jointly owe \$100 to C. A alone pays the amount to C, and B, not knowing this fact, pays \$100 over again to C. C is bound to repay the amount to B.
- (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Eusoff Chin J (as he then was) explained the ambit of this section in *Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo & Ors* [1988] 1 CLJ 319. It is a judgment of first importance because it reiterates in clear terms the proposition that the expression "coercion" in s. 73 is not "coercion" as defined by s. 15 of the Contracts Act. It is to be noted that this approach is supported by the decision of the Privy Council in *Kanhaya Lal v. National Bank of India Ltd.* [1913] ILR 40 Cal. 598 which is referred to in his lordship's judgment. Counsel for the respondents argues that the fact that his clients had asked for the insertion of the calling for the withdrawal of the police report matters not a jot. However, in response to my question, counsel readily agreed that the learned judge made no finding of coercion within s. 73. In the absence of such a finding, I consider a bald application of the section to be fatally flawed. It is, I think, elementary that a court must first find the facts and then determine whether those facts fall within the legal formula postulated by the relevant statutory provision. Any other approach would be tantamount to

a applying a statutory provision *in vacuo*. That is a task perhaps best suited for the quiet and rarified atmosphere of the academic's rooms and not for a court of law.

b While on s. 73, there is a case of English vintage which reflects the spirit and intendment of the section in point of the coercion element. Indeed, it is my view that part of the section is based upon the principle established by that case. It is *Smith v. Cuff* [1817] 105 ER 1203. The plaintiff in that case was indebted to the defendant and several other creditors. He entered into a composition with his creditors on terms that each shall accept ten shillings in the pound. The defendant agreed to the compromise. But secretly he demanded and obtained from the plaintiff a promissory note for the full sum of the debt owed to him. The defendant negotiated the note with an innocent third party who then demanded the sum of the note from the plaintiff. The plaintiff having paid upon the note brought an action against the defendant for the sum. It was held that the plaintiff was not in *pari delicto* and could recover because there had been oppression on one side and submission on the other. The defendant in that case was in a position to dictate and the plaintiff had no alternative but to submit.

e But that is not the case here. As I pointed out during argument there is nothing in the judge's judgment that finds such facts. Indeed, respondents' counsel conceded that to be the case. As against that, there is the admission by the respondents that they asked for the term. There may have been coercion. There may not. It is not a matter upon which a finding can be made on mere affidavit evidence. I think there is much force in the appellant's argument that relief in respect of the repayment ought to have been denied at least on the ground that the respondents had not proved coercion within s. 73. But I think that relief on this count should be denied on the additional ground also advanced by the appellant, namely, that the respondents were in *pari delicto*. The oppression and abject submission that was present in *Smith v. Cuff* (*supra*) is simply absent here. Accordingly I came to the conclusion that so much of the judge's order that requires the appellant to pay the sum of RM5.1 million must be set aside.

h I now come to that part of the judge's order under which the prior suit was transferred to the Shah Alam High Court. In my view the learned judge had no jurisdiction to make such an order. Paragraph 12 of the Courts of Judicature Act 1964 empowers a High Court to transfer a suit before it to another court. But it does not confer jurisdiction in the opposite direction. Accordingly, the previous action ought to continue in the court in which it originated.

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For the reasons given, the appeal was dismissed but the judge's order was varied to the extent already indicated. The respondents were awarded 75% of the taxed costs here and in the court below. The deposit was ordered to be paid out to the respondents to account of their taxed costs. The prior suit was fixed to be mentioned before the judge in chambers at the High Court in Kuala Lumpur to enable the parties to take directions as to the future conduct of the suit.

My learned brothers Mokhtar Sidin and Mohd Saari JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and express their agreement with it.

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